

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL BISHOP)	
Claimant)	
VS.)	
)	
TERRY LAMB PRO TREE SERVICE)	Docket No. 225,386
Respondent)	
)	
AND)	
)	
UNKNOWN)	
Insurance Carrier)	
)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The Kansas Workers Compensation Fund (Fund) appeals from a November 6, 1997, preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge granted claimant's requests for preliminary benefits. The Fund appeals alleging that the claimant had failed to prove respondent had sufficient payroll to come under the Workers Compensation Act, and alleging the respondent did not have an opportunity to present evidence on the issues of claimant's entitlement to temporary total disability compensation and medical benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the briefs of the parties, the Appeals Board finds that the Administrative Law Judge's Order should be affirmed.

Claimant was injured on June 25, 1997, when the bucket he was in came in contact with an electrical wire. Claimant fell approximately 35 feet to the ground sustaining injuries to his legs, spleen, neck and arms, including a broken arm, and electrical burns to his head, neck, arm, and abdomen.

(1) The Fund argues that claimant failed to meet his burden of proving respondent had sufficient payroll to come under the Act. K.S.A. 44-505(a) provides:

[T]he Workers Compensation Act shall apply to all employments wherein employers employ employees within the state except that such act shall not apply to:

(2) any employment . . . wherein the employer had a total gross annual payroll for the preceding calendar year of not more than \$20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection. . . .

Claimant was the only witness to testify at the November 4, 1997, preliminary hearing. He testified that the respondent had five to six employees working 30 to 40 hours per week earning \$6.00 to \$7.50 per hour. Claimant also testified that the respondent had five to six employees on a continuous basis for the 12 months prior to his accident. Based upon this testimony, the Appeals Board finds respondent had a total gross annual payroll for the preceding calendar year of at least \$20,000 and that the respondent reasonably estimated that its gross annual payroll for the 1997 calendar year would likewise be more than \$20,000.

The Fund presented no evidence on the payroll issue. However, the Fund argues that there was no credible evidence presented on that issue because claimant guessed at the number of employees employed by respondent and their hourly rate of pay. Furthermore, there was no written documentation, payroll records or wage statements offered into evidence.

A workers compensation claimant has the burden of proof to establish the right to an award of compensation and to prove those conditions on which the claimant's right depends. The burden of proof is the obligation to persuade the fact finder by a preponderance of the credible evidence that a

party's position is more probably true than not true on the basis of the entire record. Fetzer v. Boling, 19 Kan. App. 2d 264, 267, 867 P.2d 1067 (1994).

Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded . . . in a workers' compensation case unless it is shown to be untrustworthy; and such uncontradicted evidence should ordinarily be regarded as conclusive. Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 380, 573 P.2d 1036 (1978).

The Appeals Board finds claimant's uncontradicted testimony was not improbable, unreasonable or shown to be untrustworthy. Therefore, it is accepted as true. Based upon the record as it currently exists, claimant has met his burden of proving that respondent had sufficient payroll to be subject to the provisions of the Workers Compensation Act.

(2) The Fund next argues that the Administrative Law Judge erred in entering a preliminary hearing order for medical and temporary total disability compensation where there are disputed issues as to the claimant's entitlement to same and where the respondent did not have the opportunity to present evidence on those issues. This argument is without merit as to respondent having notice and opportunity to be heard. Respondent received notice of the preliminary hearing and simply chose not to attend. The Fund did not subpoena any representative of respondent to the hearing. However, the Fund did seek leave of court to depose Mr. Lamb as a representative of respondent but first wanted an order lifting the automatic stay imposed by the bankruptcy proceeding. The Fund alleges that because Terry Lamb filed for bankruptcy he cannot be compelled to testify. The Fund offers no support for this assertion. Although the automatic stay provision of the Bankruptcy Code may prevent a creditor from proceeding against the debtor in bankruptcy for collection of a debt, a workers compensation claim against an uninsured and insolvent respondent is not such a proceeding. Also it was the Fund that was held liable for the benefits in this case. Therefore, the automatic stay provision should not prevent the Fund from obtaining Mr. Lamb's testimony. See In re Mansfield Tire and Rubber Co., 660 F.2d 1108 (1981).

The Fund argues that two of the primary defenses the respondent and/or the Fund would raise are whether the claimant was an employee of the respondent and whether the Workers Compensation Act applies to the parties based upon the amount of the annual payroll of the respondent. It is interesting that the Fund raises a possible issue concerning whether the claimant was an employee of respondent in the same brief that begins under the heading "FACTS" that "on June 25, 1997, the claimant, Michael Lyn Bishop was employed by Terry Lamb, owner of Pro Tree Services" Nevertheless, the status of claimant as an employee of respondent was not raised as an issue before the Administrative Law Judge at the preliminary hearing. Neither the respondent nor the Fund are precluded from raising whatever issues and defenses they may choose at a preliminary hearing. Additionally, the Fund is not precluded from pursuing its defenses either at a subsequent preliminary hearing or at a regular hearing, despite the fact the Fund

may have been caught by surprise with respondent's choice not to appear and defend this claim. The Appeals Board finds no merit in the Fund's argument that the Administrative Law Judge did not have the authority to enter the Order of November 6, 1997, for preliminary benefits due to the absence of the respondent at the hearing.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge John D. Clark dated November 6, 1997, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Richard Dearth, Parsons, KS
Garry L. Howard, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director